

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-20006

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BIRCHEL LEONARD CARSON, :
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Petitioner-Appellee, :
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-against- :
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:
:
LARRY TAYLOR, Warden, :
:
Metropolitan Correctional Center, :
:
and JOHN T. CONNOLLY, Chief :
:
Probation Officer, Southern :
:
District of New York, :
:
:
Respondents-Appellants. :
:
:
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Docket No. 76-2006

BRIEF FOR PETITIONER-APPELLEE
BIRCHEL LEONARD CARSON

ON APPEAL BY THE GOVERNMENT
FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the parole revocation proceedings in this case
violated due process and the rules of the Parole Board, thus
requiring that the order below be sustained.

PRELIMINARY STATEMENT

This is an appeal by the Government from an order of the United States District Court for the Southern District of New York (The Honorable Marvin E. Frankel) entered on November 14, 1975, granting a writ of habeas corpus and releasing petitioner-appellee Birchel Leonard Carson on parole.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel to Mr. Carson on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

A. Introduction

Birchel Carson was convicted for violation of 18 U.S.C. §§2314 and 2371 and, on June 16, 1972, was sentenced to a term of five years' imprisonment. On January 30, 1975, Mr. Carson was granted mandatory release. On July 2, 1975, a parole violation warrant was issued. The following day, Mr. Carson was arrested in Biloxi, Mississippi. The violation warrant (A.161¹) charged the failure to submit a supervision report and failure to report a change in residence.

¹Numerals in parentheses preceded by "A" refer to pages of the Government's Appendix.

A preliminary hearing was held on July 15, 1975, by Mr. Brown, the Chief Probation Officer at Gulfport, Mississippi. Mr. Carson denied the charges and requested a local hearing at Biloxi, Mississippi.

Mr. Carson was brought to the Metropolitan Correctional Center in New York City on August 15, 1975 (Document #6 to the Record on Appeal).

In August 1975, Mr. Carson made a series of written requests for documents in the files of the Probation Department in order to prepare for his forthcoming parole revocation hearing.² No response was received to any of these requests, and Mr. Carson has never been permitted to see those files. They were given to the hearing examiners who conducted Mr. Carson's parole hearing, and were referred to by them during the course of the hearing and in the report of the hearing called the "summary of hearing." The Assistant U.S. Attorney submitted the documents to Judge Frankel as a sealed exhibit at the subsequent habeas corpus proceeding.

²These letters were written to the United States Probation Department in New York City, White Plains, Massachusetts, and the Community Treatment Center in New York City.

B. The Petition for Writ of Habeas Corpus

On September 4, 1975, Mr. Carson filed a petition for writ of habeas corpus seeking release from custody at the Metropolitan Correctional Center because the Board of Parole had failed to give him a timely parole revocation hearing after his arrest on July 3, 1975. In his petition, Mr. Carson both denied the allegations charged in the warrant and advised the District Court that a parole revocation hearing had been scheduled for September 25, 1975, although he had requested hearings for July and August.

On September 8, 1975, Judge Frankel endorsed an order permitting renewal of the motion if the scheduled hearing date was adjourned.

C. The Parole Revocation Hearing³

A parole revocation hearing was held on September 25, 1975. Mr. Carson was advised that he had a right to examine adverse witnesses, and that

... during the course of the hearing we will inquire into the whole period of supervision, because it will be incumbent

³The contents of the file of the Probation Department, given to the hearing examiners but not disclosed to either Carson or the lawyer representing him at the hearing, was examined with the Government's consent by appellate counsel in this case. The contents of the documents are supplied in footnotes to accompany the textual references to discussions on the same subject which took place at the parole revocation hearing.

on us to reach a decision, perhaps a second decision as to what to do in the event there is a violation, we must come up with another decision. We will be asking you what you have done during the period of supervision. We will caution you that anything you might admit to during the course of this constitutes a violation of parole that is not listed on the H-22 we as members of the Board have the right to take that into consideration and make a finding on it.

(A.62-63).

In the course of this - something might come out that we will find another violation. You do have the right to take this into consideration. If we find that it constitutes a violation we can make a finding upon the standpoint of facts on hand or your admission.

(A.63).⁴

Carson then denied both charges in the warrant (A.65). The hearing officer referred to a letter of Mr. Carson's parole officer, Mr. Berger, dated June 25, 1975, in which Mr. Berger recited the two charges and stated that on June 23 he spoke to the manager of the Empire Hotel, Mr. Carson's residence, and was told that Mr. Carson had left the hotel three weeks earlier (A.65).

Mr. Carson reported that he had mailed a letter to Mr. Berger dated May 29, 1975, in which he reported that:

⁴Errors in grammar, syntax, and spelling appearing in the quotations from the parole revocation hearing minutes are in the originals. See opinion of Judge Frankel, A.28, note 5.

- (1) he did not receive the official reporting form;
- (2) he was about out of funds;
- (3) a friend lent him money to pay his Empire Hotel bill and to move to the Plaza 50 Apartment Hotel;
- (4) he had to move because of robberies at the Empire, message mix-ups at the switchboard, and lack of kitchen facilities;
- (5) he was going to Biloxi, Mississippi, where he would stay with an old friend named Pat Gill (street and telephone number given) until about July 10; and
- (6) he was going to this Gulf Coast area where he had extensive band and nightclub connections and that he had no such connections in New York. Mr. Carson noted that on prior occasions he had received oral permission to go to Boston and Pownal, Vermont, to look for work.

(A.67).⁵

Mr. Berger said that he did not receive the letter of May 29 and that the official forms for the May and June reports (arriving early June and July, respectively) were returned to the Probation Department (A.67, 68).⁶

⁵The letter was introduced in evidence before the hearing examiner.

⁶On later examination by counsel for Mr. Carson, who examined the envelopes in which the reports had been sent, Mr. Berger admitted that he addressed the forms to "Bradley Thompson" and not to Birchel Carson:

Mr. R: The last two letters I notice you sent Mr. Carson were in the name of Bradley Thompson, is that correct, Sir? Has he registered at the hotel, to your knowledge,

Mr. Carson stated that he tried twice to telephone Mr. Berger before he wrote the letter, but that he could not

(Footnote continued from the preceding page)

under the name of Bradley Thompson? As a matter of fact, weren't the previous letters all sent to him on the name of Birchel Carson?

Mr. B: When I went out to the hotel I inquired under both names. All my inquiries all my letters sent out were Bradley Thompson and Birchel Carson.

Mr. R: Oh, but these were sent out only in the name of Bradley Thompson, not Birchel Carson, is that right?

Mr. B: I believe so.

Mr. R: And in fact, if he were listed as Birchel Carson in terms of receiving mail and of course they wouldn't know him under the other name, is that right?

Mr. B: Right, right. No, because up in the top corner there we have Birchel Carson, I believe, and ...

Mr. R: The top corner of the form?

Mr. B: Well, I guess you've got a point there.

Mr. Q: You sent to Mr. Thompson?

Mr. B: Bradley Thompson.

Mr. Q: Was he known as Bradley Thompson?

Mr. B: I can't answer that.

Further, although Mr. Berger said that from his single observation on the day he went to the hotel that the people who took the mail were careful (A.67), he acknowledged having no familiarity with the hotel's regular mail process (A.91).

reach Berger. Mr. Berger's response was that

[i]n all accounts I have always got every message from [the switchboard operator]....

(A.69).⁷

Mr. Carson explained that he had obtained oral permission to go to Boston and Waverly, New York, from the probation officer who had preceded Mr. Berger (A.71). Carson said that Mr. Berger had also given him verbal permission to leave New York to go to Pownal, Vermont, to look for business (A.71). Verbal permission was also given to go to Williamsport, Pennsylvania (A.74).

Mr. Carson believed that the letter he wrote was sufficient to permit his departure for Biloxi because he had given Mr. Berger the address at which he could be reached.

Mr. Berger confirmed that Mr. Carson had previously been given oral permission to travel. However, Mr. Berger stated that on April 3, 1975, Berger and his supervisor agreed that Carson would be restricted to an area within 75 miles of New York City unless written permission was obtained from the Board, and that Mr. Carson was informed of this decision on May 8, 1975 (A.73).

⁷In an attempt to show that it was likely that Mr. Berger did not receive Mr. Carson's messages, counsel inquired of Mr. Berger as to the number of messages he had received indicating that counsel had telephoned. The hearing examiner limited the examination to the "evidence of the allegation" (A.92).

Mr. Berger explained that the limit was placed on Carson because the parole officer had made discreet inquiries about those he referred to as Mr. Carson's "associates" in Vermont. Mr. Berger learned that

[t]he attorney for the group, according to the Chief Mr. DeShea, I believe his name is, had been arrested just that week on state fraud charges and the other fellows involved were considered to be front men for the Mafia.

(A.73).⁸

Mr. Carson denied knowledge of the travel restriction, and said that he knew of the arrest and had turned down the job and reported to Mr. Berger when he returned to New York (A.74).

Over objection by counsel, the hearing examiner told Mr. Carson, "[Y]ou [sic -- We?] have information here to indicate you were in Canada" (A.74), and Carson was asked whether he went to Canada without permission. Carson indicated that he had (A.75).

In answer to an inquiry of the hearing examiner as to whether Berger had advised Carson's friend Gill of the reason for Carson's arrest, Mr. Berger responded inappropriately on some other subject:

What was actually transpiring at that time was the police in Biloxi had contacted the FBI office and sent a TELEX to the FBI Office here and found that I was the PO on the case and called me to get some information on Mr. Carson. Apparently what they were concerned about was the ads Mr. C. was running in a local newspaper, a number of local newspapers concerning an ad in general looking for young men, teen-agers to come to New York as trainees as managers of rock and roll groups to tour the orient. The police down there were concerned and felt there were questions with moral turpitude involved and apparently they were in contact with the FBI Office in Miss.

(A.77).

Then the hearing examiner dealt with this statement on the merits and demanded an explanation of why the ads were placed and why the police were involved. When Mr. Carson began his explanation (A.77-78), the hearing examiner said:

I think you are kind of over reacting to an attempt to find out from Mr. B when he first found out that you were in Biloxi and what he said was that the information came.

(A.78).

Mr. Berger returned to the subject of travel restrictions, and then shifted to the advertisements:

I might add also that the Asst. Manager of the Empire Hotel was so familiar with Mr. C for the very type of allegation by the police in Biloxi and FBI in Miss. which was that the switchboard was constantly busy at the

Hotel Empire in response to adds placed in the Village Voice, 4 people to tour the orient as managers of rock and roll bands and well after he had left the hotel people were still coming by.

(A.79).⁹

After Mr. Carson and Mr. Gill explained that the ads were used to book bands (A.79), Mr. Berger shifted to another tack:

Also during that period April-May in fact earlier March, April and May before he went to Vermont at the time he went to Vermont he was under investigation by the FBI for the fraudulent and cashing.

(A.79).

Counsel objected unless these were added to the specifications (A.79). Mr. Berger said this showed that Mr. Carson had no reason to assume he could get blanket permission to travel (A.80).

The hearing officer then asked Mr. Carson about his kind of work, where he would live, and his future plans. Mr. Carson explained that he would live with Mr. Gill in Biloxi, Mississippi, and would work with Gill and another person at a discotheque they would jointly own (A.84). The hearing examiner then asked Mr. Berger if the parole officer in Biloxi,

Mr. Brown, had been in contact with Mr. Gill about this plan. Again, as if he had not heard the question, Mr. Berger responded off the topic:

Only what you have there, I believe, and some subsequent information, but nothing... Yeah, he did; in this subsequent letter he said something that Mr. Gill had been taken for a bounced check of a hundred or a hundred and fifty dollars.

(A.84).

Counsel objected to the lack of responsiveness, but the hearing examiner continued:

Mr. Q: Well, let me see if I can get a response from Mr. Carson. There's an allegation of bum checks. If you want to put the "bum" in quotes, if that's ... or whatever it is, tell me about it, or have you been involved in issuing checks that were insufficient funds or whatever else you would describe to the attitude?

Mr. C: O.K. in answer to that question there was a question because inadvertently a check had been written on an account. I had two accounts, one which had been closed, I had inadvertently written it to Mr. Gill; he had cashed it, and at a later date I redeemed the check. Now I don't understand how that has any bearing upon ... I don't know ... It seems to me that the man's hatred is ... knows no bounds....

(A.84).¹⁰

Mr. Carson explained that he had repaid the money (A.86).

The hearing examiner then asked whether he had paid the debts he owed in Canada (A.86). Mr. Carson claimed no knowledge of such debts (A.86). The hearing examiner then asked whether Mr. Carson used any other names while on mandatory release, and asked if charges or detainers were pending on the bad checks (A.87). To both questions Mr. Carson answered "No."

The examiner then shifted his inquiry to Mr. Berger, and asked whether any charges against Mr. Carson were pending, to which Berger responded not about any pending charges, but instead about a letter:

As to the charges in Rexdale, Ontario -- what I have is a letter which I believe I forwarded to the Parole Board and kept a photocopy for myself from one of the accountants at the Holiday Inns in Rexdale, Ontario, the Accounts Receivable section where they sent us a copy of the bill, the hotel room, the charge card....

(A.88).

(Footnote continued from the preceding page)

Counsel objected to the answer as not presenting any charges, but Mr. Berger continued:

What she said was that she had contacted the Royal Canadian Mounted Police as the ...

(A.88).

Counsel again remarked that this was not a charge, to which the hearing examiner replied:

Well, Mr. Rubin, let me just tell you something. You know, over here, we're just trying to find the facts. We can inquire into any area that we want. Mr. Carson can admit or deny anything that he wants.

But I wish you would not try to restrict Mr. Berger from answering in the best way he thinks he can handle it. We will decide whether he...

The question was any charges filed; Mr. Berger is explaining the charges filed...

Your information is, Mister [Berger], that there could be charges....

(A.88).

Given this lead, Mr. Berger continued:

That she, that the Holiday Inns had turned the matter over to the Royal Canadian Mounted Police, and as the presentence investigation of the records show, he still owes time to the Canadian jail there, so there has to be charges up there even though...

(A.88).

Then Mr. Berger made reference to a letter from Mr. Herisko. Counsel objected. The hearing examiner, referring to counsel's objection as "a note of counsel," told Mr. Berger to go ahead:

He [Herisko] had represented Mr. Carson in a civil matter. And what happened is that he received a five hundred dollar check in payment for services rendered which were double endorsed, and the check was ultimately determined to be stolen from a company, and that he turned the matter over to the Cambridge police. I talked to Detective Morrison in Cambridge, who said he was reluctant to file a criminal complaint because his department would not give him money to extradite and he did not call my office on such a charge. But at my last contact he was in the process of filing a criminal complaint.

(A.89).11

The examiner referred to a letter from Mr. Herisko dated April 29, 1975, to the Bank of New York, stating that Herisko intended to file Federal charges (A.90).

The hearing examiner asked Mr. Carson to explain the Herisko check, and Carson did so:

A check had been given to me in mapyment for a debt and I had endorsed it to Mr. Herisko, and he had been kind enough to cash it, and because of the hotel's terrible switchboard system, its communication system, had tried to call me on several occasions and when I did not respond evidently he contacted Mr. Berger. At a later date Mr. Herisko and I arrived at an agreement on the amount of money owed to. I certainly didn't attempt to burn my own attorney, you know, not...

(A.89).

I didn't pay him cash, I made an assignment to Mr. Herisko in the amount of the money involved.

(A.90).

Mr. Carson and his attorney explained the assignment to Herisko consisting of a portion of the money it was hoped they would receive on the pending lawsuit Mr. Herisko thought would bring \$40 - \$50,000 (A.90) had been made earlier than April 29.

At the time he made his comments on Herisko (A.90), the relentless Mr. Berger also stated:

And finally on Monday Mr. Lester Battles came to my office, postal inspector in the Southern District of New York, concerning an investigation of money orders which I think were documented at the time of the preliminary parole hearing in Mississippi by the Chief Probation Officer. I think there were three or four of them and they were trying to determine Mr. Carson's role in these

money orders which were termed stolen from a Boston post office --

Mr. Q: This would be an investigative stage?

Mr. B: Yes.

(A.89).12

Mr. Gill came from Biloxi to speak on behalf of Carson. Gill spoke of how his family trusted Carson, how he was the guardian of the people who played in the bands, and how his family would help Carson if his parole were transferred to Biloxi (A.94-95).

D. The Parole Decision

After a short conference held at the conclusion of the hearing, the examiners orally announced that parole had been revoked. The examiners revoked Carson's mandatory release on the ground that Carson had failed to submit a report, that he had failed to report a change of address, and that he had left the jurisdiction without permission. It was also decided to confine Mr. Carson to the expiration of his term because

... we feel your release at this time would depreciate the seriousness of your mandatory release and promote disrespect for the mandatory release process and we do not think there is a reasonable probability at this time that you would conditions of your man-

datory release.

(A.97).

Omission in the original.

The confidential "Board Summary," prepared after the hearing and not disclosed to Carson,¹³ deals with each of the charges. It referred to Mr. Carson's letter of May 29, 1975, and its contents; to Carson's attempts to reach Mr. Berger by telephone; to the assertion by Mr. Berger that he did not receive the letter or telephone messages; and to Berger's conclusion that he did not consider either the letter or the attempted telephone communications to comply with the conditions of parole:

(Hearing Summary).

As to violation two, failure to report a change in residence, the examiner wrote:

¹³The "summary" consists of the following sections:

- I. Case Identification
- II. Counsel and Witnesses
- III. Review of Charges and Finding of Fact
- IV. Other Admitted charges and Finding of Fact
- V. Information on Parole Standing as a Good Parole Risk -- Community Resources
- VI. Evaluation Review
- VII. Tentative Decision
- VIII. Other Admitted Charges
- IX. Reasons for Continuance

(Hearing Summary).

The Board also added a third charge, that of leaving the jurisdiction without permission, and concluded that Carson had committed the violation based on his admission at the hearing. On the question of whether Mr. Carson was a good risk, the Board wrote:

(Hearing Summary). Emphasis added.

The summary concluded that Carson was to be held to expiration because release would depreciate the seriousness of the release process.

The official notice of revocation, which was sent to Carson and included in the undisclosed file, revokes on the finding of three violations. The reason for continuation to expiration was that "It does not appear to be a reasonable probability at this time that you could conform to the conditions of mandatory release in that [you committed three violations]."

E. The Writ Renewed

After the hearing, Mr. Carson renewed his petition for a writ of habeas corpus (Document #3 to the Record on Appeal).¹⁴ In his application Mr. Carson complained of the allusion to the Canadian check and the Royal Canadian Mounted Police which

¹⁴ The amended petition was filed pro se.

was supported by no documents, the reference to a pending postal investigation of which he had no knowledge, of the implied assertion that Carson was associating with organized crime figures, and of the limitations on presentation of mitigating evidence.

To explain the delay in the hearing, the Government introduced an affidavit from the Regional Director of the Board (Document #17 to the Record on Appeal) stating that the Board did not learn that Mr. Carson was at Metropolitan Correctional Center until August 20, 1975; and that Mr. Carson's case was not scheduled for a hearing on August 27, 1975, when the Board met at Metropolitan Correctional Center, but the Board put Mr. Carson's case on for September 24, 1975, so that he would have time to prepare for the proceeding.

On the question of the secret documents, the Assistant U.S. Attorney said, in an affidavit to the District Court (Document #12 to the Record on Appeal):

Accompanying the Government's papers was an envelope of documents to be inspected by the Court in camera and sealed. These documents were submitted to the Parole Board to be used in connection with the petitioner's parole revocation hearing and are the subject of one of petitioner's claims herein. In connection with the Government's response to that claim, these documents are provided for the Court's inspection and consideration of the questions of whether the documents were properly withheld from the petitioner. In our submission this constitutes a reason for in camera presentation of material for determination as to whether it comes within Title 18, Section 3500.

At the hearing, the Assistant U.S. Attorney stated:

It is the Government's position that the documents that were in possession of the Parole Board for a variety of reasons, as stated in the Government's papers, were not shown to [Carson] and there was no obligation to show them.

(A.133-134).

The Assistant U.S. Attorney acknowledged that some of the documents in the file were relied upon as grounds for revocation of Carson's parole (A.134). Then, backtracking, he said that the Board used the documents only as a basis for interrogating Mr. Carson about his activities in the community (A.134-135). Finally, the Assistant U.S. Attorney agreed that if the materials were used to formulate questions and thoughts during the hearing, they became part of the materials which affect the ultimate decision (A.136-137).

He then argued that the documents in the secret package were of two types: factual documents, such as checks, copies of letters, and copies of unpaid bills "provided for the Board at the hearing" but not shown to Mr. Carson:

... those that were used by the parole board in connection with the hearing were explained to the petitioner, that he have an opportunity to examine the witnesses himself with respect to the substance of those issues, and that upon an examination of the actual documents it would reveal that the petitioner was not prejudiced in any way, because in fact, one or two of those documents, your Honor, were actually documents that the petitioner handled in the course of his activities while he was out on parole.

(A.139).

The second group of documents was categorized as evaluative summaries and letters and interagency letters (139).

The Government stated its position thus:

The Government does not contend that [the documents used were] not important at the hearing. But I think the law is clear in this area that a parole revocation hearing while important to the petitioner no doubt is not an adversarial proceeding and is more of a fact-finding and informational proceeding, and the fact here that in this case the parole board didn't actually hand over all of the documents to the petitioner but instead inquired into the subject area and explained the documents that they were using to him I think is sufficient under the present state of the law.

(A.140-141).

In an affidavit (Document #9 to the Record on Appeal), the Government took the same position, stating that Mr. Carson either knew of the contents of the documents or had been advised of their contents, and that he had cross-examined Mr. Berger. There was also a claim of confidentiality as to interagency reports.

In response, Mr. Carson stated that obviously Mr. Berger was not his only accuser, that the others were not present, and that he could not cross-examine them. Further, Mr. Carson pointed out that although he had requested permission to examine the documents in the possession of the Parole Board in New York, Massachusetts, Connecticut, and White Plains (A.143), they were never given to him.

As to the meaning of "release would depreciate the seriousness of your mandatory release," the Assistant U.S. Attorney, at Judge Frankel's request, related the significance given to it by the hearing officer:

Your Honor, that is a phrase that Mr. Quirk used to reflect his position, that the petitioner had, by his activities, had indicated a lack of his respect for the mandatory release program, and that there was no evidence of the petitioner's conformity to the conditions of the mandatory release program and depreciate the petitioner's view of his mandatory release program.

(A.146-147).

Judge Frankel granted the writ of habeas corpus and ordered the release of Mr. Carson on parole. The Judge found that "the hearing was grossly unfair in vital respects" and that

... the Board's procedures fell woefully shy of due process requirements at nearly every juncture.

Judge Frankel found an undue delay in holding the hearing, reliance on undisclosed evidence in deciding whether parole should be revoked, a hearing conducted below any tolerable level of disorder, and failure to give a statement of the evidence and reasons relied on for the decision to revoke parole.

ARGUMENT

THE PAROLE REVOCATION PROCEEDINGS
VIOLATED DUE PROCESS AND THE RULES
OF THE PAROLE BOARD, AND THE ORDER
BELOW MUST BE SUSTAINED.

A. The use of undisclosed evidence to reach
the decision to revoke parole and to con-
tinue Carson's incarceration to expiration
violates due process and the Parole Board's
own rules.

Judge Frankel found that the hearing examiners relied on undisclosed evidence in deciding to revoke parole. This evidence included both the documents in Mr. Berger's file which was given to the examiners and the informers who supplied the information contained in those documents.

Although at the hearing below the Government conceded that the documents did affect the ultimate decision,¹⁶ on appeal it is argued that no error occurred because the documents referred to were related in substance to Carson and that he had an opportunity to cross-examine Mr. Berger about them. The

¹⁶On appeal, the Government tries to limit the impact of the concession and says that the only inference to be drawn from the statement of the Assistant U.S. Attorney is that the documents were used to question Mr. Carson (see Government's brief at 19-20). However, the colloquy, see A.140, in which the Government attorney stated that the Government did not contend that the documents were not important at the revocation hearing, does not permit a limited interpretation.

Government's argument then continues that the documents not referred to were not influential at all in reaching a disposition.

There can be no question that the information contained in the documents was used in the decision-making process. By way of introducing the hearing, the examiner said he would inquire into the whole period of supervision. Of necessity, the basis of the inquiry was the secret file. At the hearing, on no fewer than twelve instances reference was made to information contained in them or inquiries were made based on their contents. The hearing summary made specific reference to the disputed Herisko information, the explained Gill check, and the unconfirmed Canadian information, all of which, said the examiner, indicates "some question about the subject's overall behavior while under supervision." Further, the summary makes reference to the whole probation file, with its suspicions, unconfirmed reports, and incomplete investigations, and goes on to state:

There is no way of ascertaining what, if anything, in the file was not considered by the examiners.

Morrissey v. Brewer, 408 U.S. 471, 489 (1972), is unequi-

vocal in its position that due process requires disclosure to the parolee of evidence against him, the opportunity to be heard in person and to present witnesses and evidence, and to confront and cross-examine adverse witnesses. Obviously, in this case the right to be heard, to present evidence, and to confront and cross-examine witnesses was dependent in no small part on disclosure of the adverse evidence in the documents. It seems undisputable that if the adverse evidence and the sources of the evidence are contained in documents, they must be revealed. Morrissey's application of the principle of disclosure to parole proceedings is the rational outgrowth of the development of the principle in criminal proceedings. Historically, judges of this Court have been leading advocates and articulators of disclosure. More than thirty years ago Judge Learned Hand required the Government to disclose information, despite a contrary regulation, where the Government chose to use the evidence in support of its position:

... While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The Government must choose; either it must leave the transactions in the obscurity from which a trial will draw them,

or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively. We hold that the regulation should have been read not to exclude the reports here in question.

United States v. Andolschek,
142 F.2d 503, 506 (2d Cir.
1944).

In United States v. Beekman, 155 F.2d 580, 584 (1946), this Court required disclosure of OPA records concerning four Government witnesses at a criminal trial, reiterating that

when the Government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege.

In United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952), Judge Hand reiterated the rule:

[It is] one thing to allow the privileged person to suppress the evidence, and, *toto collo*, another thing to allow him to fill a gap in his own evidence by recourse to what he suppresses. In United States v. Andolschek, [*supra*, 142 F.2d at 506] we held that, when the Government chose to prosecute an individual for crime it was not free to deny him the right to meet the case made against him by introducing relevant documents otherwise privileged. We said that the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than disclosure of such "state secrets" as might be relevant to the defense. To that we adhere.

See also United States v. Clark, 475 F.2d 240 (2d Cir. 1973);
cf. United States v. Reynolds, 345 U.S. 1, 12 (1953).

In Greene v. McElroy, 360 U.S. 474, 496 (1959), the Supreme Court articulated the disclosure principle and, in light of Greene, the applicability of disclosure to administrative adjudications and the meaning of disclosure under Morrissey cannot be doubted:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or why, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, ... but also in all types of cases where administrative and regulatory actions were under scrutiny. ... Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation....

Greene v. McElroy, *supra*,
360 U.S. at 496-497.
Citations and footnote
omitted.

Contrast Hannah v. Larche, 363 U.S. 420, 441-442 (1960).

The Government's position that a summary or a paraphrasing of the contents of a document by Mr. Berger or the hearing examiner is adequate does not meet the constitutional requirement of disclosure. Paraphrasing or summarizing is not, by definition, a revelation of the complete contents of the document which was before the decision-maker. The verbal version is merely the testimony of the person making it. Without the document, there is no way of ascertaining whether its contents are being accurately or fully represented, or even whether the summary reflects what is written. Indeed, the idea of the parolee receiving a second-hand rendition of the evidence which is presented to the decision-maker was rejected by this Court in United States v. Clark, supra, where it was found that the exclusion of a defendant from the courtroom during a suppression hearing was not cured by the permission granted to defense counsel to relay the testimony to the client waiting outside. Id., 475 F.2d at 240, n.6.

Further, Coplon made unequivocally clear that the need for the documents, or even the likelihood that the documents would be of no help at all, were not considerations when disclosure was at issue. See also United States v. Clark, supra. Relevance is the only test.

It seems obvious that without actually seeing the documents, the parolee cannot challenge, explain, or mitigate the charges, or make clear to the Board that they are merely rumor or suspicion or unconfirmed. Here, Carson had no idea of the

speculative nature of the contents of the documents.

Of course, the failure to give Carson or his attorney the documents prevented effective cross-examination of Mr. Berger, both as to the accuracy of his rendition of the documents and as to their contents.¹⁷ Jencks v. United States, 353 U.S. 657, 667-670 (1957), citing Beekman and Andolschek. Indeed, where counsel had the information available to him, he showed that Berger's statements were inaccurate and misleading. Counsel was able to demonstrate that the probable reason why Carson did not receive the official reporting forms was Berger's having addressed the forms to Bradley Thompson, although Berger knew that Carson was registered at the Empire Hotel as Carson. Indeed, Berger acknowledged that it was his mistake.

The Government argues that the facts taken from the documents were summarized adequately for Carson to rebut them and to examine Mr. Berger about them. A comparison of the summary given by Berger or the examiner with the document itself shows that the information was not accurately or fully revealed. Thus, full rebuttal and skillful cross-examination of Mr. Berger was not possible.

¹⁷It also precluded a challenge to the accuracy of those questions posed by the hearing examiners which were based on information contained in the documents.

Mr. Berger spoke at the hearing of the people who had been investigated in Vermont:

[T]he other fellows involved were considered to be front men for the Mafia.

The undisclosed letter of April 7, 1975, written by Berger, presented that information in a substantially less ominous form.¹⁸

On the question of newspaper ads for bands, Mr. Berger implied at the hearing that the police in Mississippi were concerned that the ads involved some kind of moral turpitude. A short while later Mr. Berger made a further statement about newspaper ads:

I might add also that the Assistant Manager of the Empire Hotel was so familiar with Mr. Carson for the very type of allegations by the police in Biloxi and the FBI in Miss.

However, in his letter of June 25, 1975, reporting this, Mr. Berger was apparently more truthful, for he said only that

Again, counsel and Mr. Carson were precluded from examining Mr. Berger on the truthfulness and accuracy of his statements at the hearing, and were unable to defuse the impact of Berger's false statement.

¹⁸On use of this kind of speculative information, see infra at 51.

Again at the hearing, Mr. Berger referred to an "investigation by the FBI for fraudulent check cashing." Mr. Carson and his attorney had no knowledge of this investigation, and could make no inquiries about it. A disclosure of the letters of Mr. Berger dated April 7, 1975, and May 8, 1975, would have revealed that

Knowing this, counsel could have drawn the hearing examiners' attention to the favorable information.

Not content, Mr. Berger, in response to the examiner's inquiry about Mr. Carson's future plans, made reference to a check that had been paid to Mr. Gill and bounced. The hearing examiner requested an explanation about "bum checks":

Well, let me see if I can get a response from Mr. Carson. There's an allegation of bum checks. If you want to put the "bum" in quotes, if that's ... or whatever it is, tell me about it, or have you been involved in issuing checks that were insufficient funds or whatever else you would describe to the attitude?

Mr. Carson could hardly respond adequately, for he was not told any specific instance being referred to.

The most obvious misstatement by Mr. Berger was his assertion that Carson gave a stolen Dreyfus Fund check to Mr. Herisko, a Boston lawyer retained by Carson to retain him in a Federal civil litigation. This statement appeared in the examiners' summary of the hearing. However, the file would have revealed that the check was lost and not stolen. If

counsel had seen the file, he could have corrected this erroneous and very prejudicial statement by Mr. Berger.

The Herisko letter demonstrates how Carson was deprived of his opportunity to present his case. Asked to explain the \$500 check he gave to Herisko which had not cleared, Carson explained that, to make good on the debt, he had made an assignment of a portion of money they hoped to win in the pending lawsuit. Herisko, on the other hand, claimed that Carson had not paid him.

This information supported Carson's statement that he had made arrangements to pay Herisko from the proceeds of the suit. Yet counsel could not present this picture of the case, because he did not know about the information.

Clearly, the Government's contention of accuracy is false. This serves to highlight that the right of disclosure is virtually absolute and that summaries are not sufficient.¹⁹

The Government's brief seems to imply that because the undisclosed information was related to the dispositional aspects of the proceeding, rather than to the determination of

¹⁹As Judge Frankel found, the Government below made no claim or showing of confidentiality or danger. The Government claimed that those documents were interagency memoranda. However, that claim is not made here, and is in any event an invalid claim under the cases cited supra at 27-30.

violation, disclosure was not necessary. Any such distinction, however, has been rejected. Regardless of the stage of the proceeding, whether determination of violation or a decision on disposition, the treatment of factual information is the same. Indeed, Morrissey envisions that the dispositive stage will have factual components and that they will necessarily influence that part of the decision which attempts to predict parole risk:

The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing anti-social acts. This part of the decision, too, depends on facts, and therefore it is important for the Board to know not only that some violation was committed but also to know accurately how many and how serious the violations were.

Morrissey v. Brewer, supra,
408 U.S. at 480.

Society ... has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions.

Id., 408 U.S. at 484.

[The final hearing] must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation.

Id., 408 U.S. at 488.

This Court has also made clear that the accuracy of all the factual information considered is significant. In Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079, 1087 (2d Cir.

1971), vacated as moot, U.S. (19), speaking about the aid a lawyer might provide on any factual issue in the case, this Court said:

... A trained lawyer might well have discovered mitigating circumstances and hidden significances not revealed or immediately obvious on the face of Mercer's report. For example, the Board might well have welcomed a suggestion for a fuller investigation of Bey's alleged announced intent to depart the state, or his oblique threat to repeat his past crimes. Perhaps Bey's employers could have supplied useful information as to Bey's dependability and thoroughness on the job. A review of Bey's reported letters to Porter School girl students might have revealed different hues of motivation than found their way into Mercer's report.

Thus, at the least a diligent lawyer representing Bey before the Parole Board might have investigated the decisive events of Bey's brief period of release and in an orderly, disciplined presentation to the Board have attempted to establish facts more favorable to Bey than those presented by Mercer and McIlduff and have suggested their relevance to the four alternatives less severe than revocation available to the Board in disposing of Bey's case. ... The fact that the Board performs a predictive and prognostic function does not depreciate the importance of accurate factual exposition and evaluation....

Id., 443 F.2d at 1087-1088.

While the Court was speaking of the right to counsel,²⁰ the premise underlying that right was the need for counsel in assuring the accuracy of the facts used in determining dispo-

²⁰ See Gagnon v. Scarpelli, 411 U.S. 778 (1973).

sition. The same need existed here.

Judge Frankel found that the failure to disclose evidence and to permit confrontation with adverse witnesses violated not only the Constitution, but the Board's own rules as well. 28 C.F.R. §2.56(d) and (e). Under those rules, persons who have given statements upon which revocation is based must be present if the parolee so requests, and all evidence upon which a finding of violation may be based shall be disclosed. It is clear that the witnesses -- Mr. Herisko, the woman from Canada, the FBI agents, the probation officers from Vermont and Biloxi -- were not produced. Nor were the documents disclosed.²¹

A second point to be disposed of is that Mr. Carson was satisfied with the procedure and asked for nothing further. To the contrary, prior to the hearing -- in August 1975 -- Mr. Carson wrote letters to the Board in New York, Boston, and White Plains, and asked to see his files.²² He referred to his requests during the parole hearing and at the proceeding before Judge Frankel.

²¹ The Government argues that these two regulations apply only to the determination of violation, and not to the disposition phase of the hearing. If that interpretation is correct, the regulations are unconstitutional.

²² His request was made under the Privacy Act, 5 U.S.C. §552(a), but was clearly intended for preparation of the case. Although 5 U.S.C. §552(a)(j)(2) and §552(a)(k)(2) excepts investigative and parole files from disclosure, they are, under a provision of 5 U.S.C. §552(a)(k)(2), available to the extent they are available under Federal law.

There is no doubt that the documents in the probation filed contained factual information which was used to revoke parole. Carson should have been able to test the truthfulness of those factual allegations by knowing precisely what they were by being able to examine Mr. Berger about them from the documents, calling such witnesses as were necessary, and rebutting them from his own knowledge. These due process rights were not afforded Mr. Carson.

B. Due process was violated by the Board's failure to give a written statement of the evidence it relied on and its reasons for revoking parole.

The procedures of the Parole Board produce three decisions: a determination as to whether there has been a parole violation; a decision on whether to revoke parole; and, if revocation occurs, the period of incarceration. The parolee is advised of these decisions orally subsequent to a brief conference held by the examiners at the close of the hearing, and in a written notice of action forwarded several weeks later.²³ The oral opinion here simply stated that parole was revoked because Mr. Carson committed three violations: the two charged in the warrant, and a third added after the hearing.²⁴ The oral decision to reincarcerate Mr. Carson to the expiration of his term was based on the

... feel[ing that] release at this time would depreciate the seriousness of [his] mandatory release and promote disrespect for the mandatory release process, and we do not think there is a reasonable probability at this time that you would [omission] conditions of your mandatory release.

A.97.

²³ The summary of hearing is a confidential document not disclosed to the parolee.

²⁴ See infra at 46.

The written notice of action (A.54) made no additions to the oral statement, merely iterating the routinized language previously spoken. Both the oral decision and the written notice violate due process, for they give no statement of the evidence relied on to find the violations or to revoke. Nor do they give any meaningful statement of the reasons for revocation of parole or for the continuation of sentence until expiration. Morrissey v. Brewer, *supra*, 408 U.S. at 489;²⁵ see also Wolff v. McDonnell, 418 U.S. 539, 564-565 (1974). They give no statement of the evidence relied on to establish the two violations actually charged in the warrant -- failure to notify of a change in address, and failure to submit a supervision report. See O'Brien v. Henderson, 368 F.Supp. 7, 9 (N.D.Ga. 1973). The opinion says only that the violations were established.

A finding of the third violation, added after the hearing, was said by the Board to be based on Carson's admission. However, since revocation was based on a finding that three violations had been committed, this reference to a single piece of evidence relevant to only one of the three will not meet the requirement of a statement of the evidence. Further, no statement at all is given as to the evidence which was considered

²⁵Morrissey makes clear that the requirement of a statement of evidence and reasons relate to the dispositional decision as well as to the finding of violation.

in reaching the decision that Carson was to be reincarcerated until the end of his sentence.

The reason given for the decision to revoke and continue Carson in custody until the expiration of his sentence is meaningless and unintelligible. Indeed, on two occasions (see Document #11 to the Record on Appeal at 2 and A.146), Judge Frankel asked the Assistant U.S. Attorney to explain the meaning of "depreciate the seriousness of your mandatory release." The response brought no enlightenment to the problem:

Your Honor, that is a phrase that Mr. Quirk used to reflect his position, that the petitioner had, by his activities, had indicated a lack of his respect for the mandatory release program, and that there was no evidence of the petitioner's conformity to the conditions of the mandatory release program, and that to release him at that time, in view of his activities, would depreciate the parole board's view of the mandatory release program and depreciate the petitioner's view of his mandatory release program.

(A.146-147).

The only intelligible part of the whole statement -- that there was no evidence that Mr. Carson had conformed to the conditions of mandatory release -- is false, for there is substantial evidence of compliance.

Not only is there no statement of the evidence relied on, but there is no attempt to individualize the reasons so that the parolee understands why his behavior warrants revocation and the resulting term of custody. The language used here gives no indication that the Board considered the relevant

criteria for revocation, the ability of the individual to live in society without committing antisocial acts (Morrissey v. Brewer, supra, 408 U.S. at 480) and whether the individual is still a good parole risk (Preston v. Priggman, 496 F.2d 270, 274 (6th Cir. 1974); Caton v. Smith, 486 F.2d 733, 736 (7th Cir. 1973)).

Even in prison discipline and classification proceedings where due process rights are narrower than those required at parole revocation hearings (Wolff v. McDonnell, supra), the Supreme Court so clearly assumed that a statement of the evidence relied on was necessary that in order to omit such a reference, the decision-maker had to indicate he was doing so:

Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others. It may be that there will be occasions when personal or institutional safety are so implicated, that the state may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements.

Wolff v. McDonnell, supra,
418 U.S. at . Footnote
omitted.

The rationale for requiring a statement of reasons is ample demonstration of why the opinion given here was constitutionally inadequate. As this Court noted in a case involving a parole grant hearing, the question is whether

... a reviewing court [is] able to determine whether there has been an abuse of discretion without merely substituting the judge's will for the board's discretion[.]

But whether or not [the statute provides a decision-making scheme] a statement of reasons will permit the reviewing court to determine whether the Board has adopted and followed criteria that are appropriate, rational and consistent, and also protects the inmate [here, the parolee] against arbitrary and capricious decisions or actions based upon impermissible considerations.

Johnson v. Chairman of the New York Bd. of Parole, 500 F.2d 925, 929 (2d Cir. 1974), vacated as moot sub nom. Regan v. Johnson, 419 U.S. 1015 (1975).

Johnson makes clear that the decision must be in accord with the relevant legal standard (see supra at 42) and that the Board must state the grounds for its action in such a way as to reveal that it "applied permissible criteria, considered relevant factors and acted rationally rather than pursuant to whim or caprice in any given case." 500 F.2d at 930. Johnson also makes clear that a "reasons requirement" "promotes thought in the decider" (*Id.*, at 931, quoting Frankel, CRIMINAL SENTENCES, 40-41 (1973)), and aids in rehabilitation by letting the inmate know on what the decision rests (500 F.2d at 932).

The opinion given here provides none of the information required. As Judge Frankel noted, the three violations on their face are not so dangerous or beyond the scope of other, less severe penalties than revocation and reincarceration to expiration, as to justify in themselves the penalty meted out. Since the Board has the power to find the violations without revoking parole, there is no way of ascertaining why in this case revocation and reincarceration to expiration resulted and in other cases it does not.

In Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975), again in a parole grant proceeding, this Court found that the terse language and vague phrases (525 F.2d at 544) of a decision which read "held to 7/75 Board with improved record" were inadequate because they did not "evinced the Board's consideration of relevant factors" nor give the "grounds for the decision" and the "essential facts from which the Board's inferences have been drawn" (525 F.2d at 544). The same is true of the boilerplate used here. See also Cadaropoli v. Norton, 523 F.2d 990, 998 (2d Cir. 1975)).

Indeed, the use of the very boilerplate language in the Board's opinions in this case has been condemned as meaningless:

This Court is of the opinion that it is the rare case in which the mere giving of the kind of reasons stated by the Board in this case, without any elaboration or further specification, is sufficient to impart any useful information to the prisoner [here, parolee]. Use of mere pro forma language such as that employed here makes a mockery

of the requirement that a prisoner be given reasons for the denial decision.

Stassi v. Hogan, 395 F.Supp.
141, 144-145 (N.D.Ga. 1975).

Billiteri v. U.S. Bd. of Parole, 385 F.Supp. 1217, 1219-1220
(W.D.N.Y. 1974); Candarini v. Attorney General, 369 F.Supp.
1132, 1136-1137 and fns. (E.D.N.Y. 1974).

C. The Board found Carson had committed
three violations which were not charged
in the warrant, and thereby violated the
due process requirement that he be given
notice of the charges.

In the warrant Carson was charged with a failure to report a change of address and a failure to submit a supervision report. He denied both these charges at the preliminary hearing, and prepared his response to those charges to be presented at the final hearing.

On the day of that final hearing, by way of introduction to the proceedings, the examiner told Carson that if during the proceeding he admitted any conduct which could constitute a violation of parole, that conduct would be added to the proceeding as a violation.

In its formal decision, the examiners announced that they found Carson had committed the two violations charged in the warrant. They also added a third violation, that of leaving the jurisdiction without permission, based ostensibly on Carson's admission at the hearing.

It is of course apparent that this third charge was added after the hearing. What is less obvious, however, is that the Board did not find Carson had committed the two acts charged, but actually found Carson in violation of two other charges which were not in the warrant. This is evidenced by a com-

parison between the official decision and the confidential board summary revealing that the two are inconsistent. What was determined in the board summary was that Mr. Carson had either failed to submit his supervisory report on the required form or alternatively that he failed to come to Mr. Berger's office, and that he had not sought "permission to report a change of address." This announced policy of adding violations during the hearing and of changing them to fit the evidence produced violates Morrissey v. Brewer, supra, 408 U.S. at 489.

In Morrissey, the Supreme Court required written notice of the claimed violations. 408 U.S. 471. Wolff v. McDonnell, supra, 418 U.S. at 563, extended this element of Morrissey to prison disciplinary proceedings, and explained that written notice must inform the parolee of the charges and enable him to marshal the facts and prepare a defense. 418 U.S. 564.

This Court has held, in Cardaropoli v. Norton, supra, that written notice is required at least ten days prior to the hearing when a special offender classification at an institution is contemplated, and the notice must specify the reason or reasons for the proposed designation and provide a brief description of the evidence.

Timely notice is critical in parole proceedings, for even if a violation has occurred, the parolee can present evidence to mitigate the disposition. Thus, for example, if Carson had known that his visit to Canada was to be added as a violation, he could have presented evidence as to why it was necessary to

go to Canada. The record in the case makes clear that Carson used all his efforts to try to find work as an agent for bands or for bands employed at clubs or in related fields. He explained that he had no connections in New York to help him, that he knew people in Boston but that the parole people would not, for some unexplained reason, transfer his supervision to Boston, that his travels were basically to find work, and that Mr. Berger was aware of the difficulty.

The late addition of the charge to the case prevented Carson from conferring with his counsel, preparing his explanation, producing evidence or witnesses²⁶ to show that he was in Canada to find employment. See Preston v. Priggman, supra, 496 F.2d at 274-275.²⁷

Returning to the Board summary report, it shows that Carson was not found to have committed the violations charged in the warrant, but others not charged. The first violation

²⁶ Further, if the Government's interpretation of the Board's rules is correct, which of course Carson disputes, Carson was prejudiced because his right to disclosure of documents and cross-examination of adverse witnesses was denied since the charge was added after the hearing.

²⁷ By way of contrast, Mr. Carson was prepared to explain and did state that he was in Biloxi on business. Mr. Gill, his friend, appeared on his behalf, and explained that they were trying to open a club after getting permission from the town council. Papers submitted to the town council were also presented.

charged was that Carson failed to submit a supervision report for May 1975. Mr. Carson denied that charge, stating that he had not received the usual form for the report, that he had tried to reach his parole officer on the telephone, and that on May 29, 1975, he wrote a long letter to Mr. Berger. This letter, which was read to the hearing examiners, advised Mr. Berger of a change of address and job expectations. Subsequent evidence revealed that Mr. Berger had not sent the official form to Mr. Carson under his own name. Mr. Berger asserted that he did not receive the letter or telephone messages. The examiners concluded that

The failure which the Board found was not a failure to submit a supervision report, but a failure

No such violations were charged, and as to the former, the rules do not even require that the report be in any particular form.²⁸

²⁸This situation confirms Judge Frankel's surprise that a revocation with incarceration to expiration should be premised on such a violation.

The second violation charged in the warrant was a failure to report a change of address. Mr. Carson stated that he reported his change of address to the Park 50 Hotel and his temporary sojourn to Biloxi in the May 29 letter. What the hearing examiners found was not that Mr. Carson had failed to report a change of address, but that

This is not the charge made. The descriptive paragraph which precedes this finding relates entirely to whether

29 Such a violation was not the subject matter of the charge.

If leaving the jurisdiction and the 75-mile limit was the gravamen of the violation, then Carson was entitled to have Berger's supervisor appear for cross-examination as to how the restriction came about, and since Carson denied being told of the limit, the method of notification employed. The lack of notice and the change in charges precluded such action.

D. The informality of the proceedings deprived
Carson of a fair hearing.

Judge Frankel stated of the hearing:

[T]he "informal hearing" must, of course, be "structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.... There is a level of disorganization, of unguided conversation, and of uncontrolled irrelevancy at which informality becomes prejudicial confusion. The hearing in this case fell repeatedly and inexcusably to that level.

(A.18).

The record is replete with statements by Mr. Berger that present unverified facts about Carson's behavior. Most of these statements came into the hearing as non-responsive answers to the examiners' inquiries. They were objected to by counsel, whose statements were dismissed off-handedly by the examiners, who also limited either cross-examination by counsel or responses by Carson.

An instance early in the proceeding occurred when Berger was discussing the 75-mile radius limitation on Carson's travel. He launched into a long discussion of the unconfirmed suspicions that the people in Vermont were Mafia-connected. Further, there is no indication of any relationship between Carson and the Vermonters except on the one occasion when he sought employment. Carson reported that he turned down any job.

When Berger was asked how he knew Carson was in Biloxi,

Berger talked of newspaper ads involving questions of moral turpitude. Berger had never seen the ads, and was reporting what local Mississippi police "felt" were problems. When counsel objected, the examiner asked Carson to explain the police involvement, and when Carson attempted to do so, the examiner cut him off, saying he was over-reacting.

The examiner returned to the subject of the 75-mile radius limitation, whereupon Berger began stating that the assistant manager of the Empire Hotel was also concerned about the kind of allegation made by the Biloxi police about the ads. The implication of moral turpitude was made with no indication that Berger had seen the ads, and Berger's undisclosed report of June 25 shows that his source did not give any information supporting the inference.

The examiner later asked if any charges were pending against Carson. Although there were none, Berger took this opportunity to talk about a letter from a woman at Holiday Inns of Canada concerning an unpaid bill and her contact with the Royal Canadian Mounted Police. Counsel objected, and the examiner responded:

Well, Mr. Rubin, let me just tell you something. You know, over here, we're just trying to find the facts. We can inquire into any area that we want. Mr. Carson can admit or deny anything that he wants.

But I wish you would not try to restrict Mr. Berger from answering in the best way he thinks he can handle it. We will decide whether he

(A.88).

Mr. Berger went on to the letter from Mr. Herisko, which also had produced no charges, and a pending investigation concerning a postal robbery, which also had produced nothing.

This exploration of the record fully supports Judge Frankel's conclusion that what is quoted

... convey[s] the atmosphere of slovenliness and disarray in which petitioner was invited to defend against being returned to prison. Hearing officers can and must do better. If the administrative hearing room need not resemble a courtroom, it may not become a shambles.

(A.23).

E. The hearing was delayed.

Carson was arrested on July 3, 1975, and no hearing was held until September 24, 1975. The three-month delay is explained by the Government in its brief as being Carson's own fault because he was in Biloxi. However, the long route back to New York through several other prisons (see A.15) which lasted until August 14, 1975, is a function of Governmental operations.

According to the Government's own papers, the Board was not notified by other Government officials of Carson's presence in New York. This ignorance persisted despite Carson's requests for hearings in July and August. It appears that this failure to schedule a timely hearing is also a continuing Government problem (see, e.g., Shelton v. Parole Board, S.D.N.Y. 75 Civ. 5121 (Knapp, J.) (sub judice); Sawyer v. Parole Board, S.D.N.Y. 76 Civ. 1503 (Wyatt, J.) and, as Judge Frankel stated, was symptomatic of the Government's procedures throughout the proceeding.

The Government's procedures throughout this proceeding were entirely inadequate and violative of due process, as Judge Frankel correctly found. Accordingly, the order below should be sustained.

CONCLUSION

For the foregoing reasons, the order below should be sustained.

Respectfully submitted,

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